SUPREME COURT, U. S.
JUL 24 1970
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 449

JAMES JUDE TAGLIA,

Petitioner,

v.

MELVIN R. LAIRD,
Secretary of Defense

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Your Petitioner, James Jude Taglia, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the Case of *James Jude Taglia v. Melvin Laird, Secretary of Defense* on April 27, 1970.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit (*infra*, Appendix A), which

was handed down without opinion, is not reported. The opinion of the United States District Court of the District of Columbia on cross motions for summary judgment (*infra*, Appendix B) is not reported. The decision of the Central Industrial Personnel Access Authorization Board in the Office of the Secretary of Defense (*infra*, Appendix C), on the basis of which the Secretary of Defense revoked Petitioner's security clearance, is not reported.

JURISDICTION

The judgment of the United States Court of Appeals affirming the order of the United States District Court granting the motion of the Secretary of Defense for summary judgment and denying the motion of Petitioner, was entered on April 27, 1970. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Secretary of Defense may revoke an industrial security clearance[1] of an employee of a defense contractor, thereby depriving him of his chosen occupation on the basis of (1) a regulation adopted by him which makes no provision for compelled cross examination of, or production of documents by, recalcitrant witnesses and nevertheless provides for revocation in such cases in violation of the Presidential Executive Order on which it is founded; (2) a hearing before a hearing officer, during which witnesses who testify against the employee refuse, the hearing officer being without statutory or regulatory authority to compel

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[1] It should here be noted that throughout, the proceedings before the Field Board and the Central Board are denominated as an application for an "Access Authorization," as if the proceedings were original proceedings rather than a proceeding to revoke an existing "Access Authorization"; i.e., Security Clearance.

them to do so, to produce, or to answer questions on cross examination with reference to, written allegations made by or to such witnesses of alleged violation of Industrial Security Regulations which are the subject of the hearing; and (3) an adverse decision of a board in the Secretary's office, after a hearing at which the hearing officer's report is considered for adoption but access to the report is denied to the employee.

CONSTITUTIONAL PROVISIONS, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that:

> "No person shall be deprived of . . . property without due process of law; . . ."

Comprised within the "Question Presented" *supra* is the question of whether Petitioner was deprived of his job without due process of law.

Petitioner contends that there are no statutory provisions involved, only the Executive Orders of the President, which followed *Greene v. McElroy*, *infra*, and the Industrial Personnel Access Authorization Review Regulation of the Secretary of Defense, Department of Defense Directive Number 5220.6 of July 28, 1960. The Executive Orders and the Regulation are presented in full text as part of the Record filed with this Petition. (R. 1, Addendum 1 to Petitioners Brief below) Pertinent parts of them are hereinafter set forth.

Executive Order No. 10865 of February 20, 1960, 3 CFR 1959-1963, Comp. 39.8, provides, *inter alia*:

> SECTION 1. (a) . . . the Secretary of Defense. . . . shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that

relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

* * *

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

* * *

(6). An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

* * *

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the

information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

* * *.

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the

head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

Section 6 of Executive Order No. 10865 was amended by Executive Order No. 10909 of January 17, 1961 3 CFR 1959-1963 Comp. 437, to read as follows:

"Sec. 6. . . . the Secretary of Defense, . . . may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amount payable under Standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the

Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

The Industrial Personnel Access Authorization Review Regulation, Department of Defense Directive No. 5220.6, July 28, 1960, *supra*, 25 FR 7523, has been superseded by DOD Directive 5220.6 of December 7, 1966; codified in 32 CFR, Part 155, 32 FR 16188):

IV. PROCESSING OF CASES

* * *

D. *Personal Appearance*

1. Promptly after being notified by the Director that a case has been referred for a personal appearance proceeding, the Chairman of the Field Board shall set a time and place for the proceeding and inform the applicant thereof. Personal appearance proceedings shall be held as soon as practicable, allowing the applicant and the Department of Defense a reasonable time to prepare. Postponements may be granted by the Chairman in his sound discretion upon application by either party with notice to the other.

* * *

4. The applicant is responsible for producing witnesses in his own behalf or presenting other evidence before the Field Board to support his reply to the Statement of Reasons. When specific assistance is requested, however, the department counsel and the Chairman of the Field Board may provide such assistance, upon a showing that it is practicable and necessary. In the Chairman's sound discretion, invitations to attend the proceedings as witnesses in the applicant's behalf, or requests for specific documents or other physical evidence, may be tendered upon application, provided a showing of the necessity for such assistance has been made.

* * *

E. *Procedures for Personal Appearance Proceedings*

1. *General Provisions*

* * *

f. Witnesses before the Field Board shall testify subject to the provisions of Sec. 1001, Title 18, U.S. Code. Before testifying they shall be informed that said section makes it a criminal offense punishable by a maximum of five years imprisonment, $10,000 fine, or both, knowingly and willfully to make a false statement or representation to any department or agency of the United States. Written interrogatories must be sworn to before a notary public or other official authorized to administer oaths.

* * *

2. *Introduction of Information*

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

* * *

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the

following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense . . . has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, . . . to be good and sufficient.

g. A written or oral statement of a person relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant may be received and considered without affording the applicant an opportunity to cross-examine the person making the statement, irrespective of whether the statement is adverse to the applicant or relates to a controverted issue, provided the appliant is given notice that it has been received and may be con-

sidered by the Board, and is informed of its contents to the extent permitted by paragraph I.D.4., above.

h. Whenever information is made a part of the record under the exceptions authorized by subparagraphs e. or f. (1) or (2), the record shall contain certificates evidencing that the determinations required therein have been made. Such certificates shall include the reasons therefor and shall be made available to the applicant unless their disclosure is prohibited by paragraph I.D.4., above.

i. In any case where information is received by the Field Board pursuant to subparagraphs e. or f. (1) or (2), a final determination adverse to the applicant in a Department of Defense case shall be made only by the Secretary of Defense, . . . based upon their personal review of the case.

F. *Field Board's Report*

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. *The report shall not be made available to the applicant.* [Emphasis supplied.]

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the

Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. *Action by the Central Industrial Personnel Access Authorization Board*

* * *

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board

shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and, through the Director, shall give notice thereof to both the applicant and department counsel and at the same time shall furnish department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

* * *

c. Personal appearances before the Central Board and written briefs filed with the Central Board are intended to permit the applicant and department counsel to present their positions based exclusively upon the record made before the Field Board, and shall not be used as a substitute for proceedings before such a Board. Argument may be made, but witnesses shall not be heard and testimony shall not be taken.

d. Under a. and b., above, when the applicant or department counsel, as the case may be, has filed a written notice of intention, the other shall be entitled at the designated time to appear personally or file a written brief as he may prefer. Failure by him to utilize this opportunity shall be deemed a waiver thereof.

e. After the applicant and department counsel have submitted written briefs or appeared before the Central Board, as provided in subparagraphs a. and b., above, the Board shall reach a final determination in all cases in which it is authorized to do so, and shall refer all other cases to the Director for action by him in accordance with paragraph H., below. If the applicant under subparagraph a., above, or department counsel under subparagraph b., above, fails to file written notice of intention, or fails, after filing such notice, to appear or file a written brief in a timely manner, the tentative decision of the Board shall automatically become final in all cases in which the Board is authorized to make

a final determination and notice thereof shall be given in accordance with paragraph I., below; in all other cases the tentative decision shall be referred to the Director for action by him in accordance with paragraph H., below.

4. In reaching a determination or conclusion as hereinabove provided, the Central Board may adopt, modify or reverse the findings, conclusion, or recommendation of the Field Board, or may return the case through the Director to the Field Board with instructions to take further testimony or conduct other proceedings. In each case it shall consider the matters set out in paragraph IV.F.3., above.

5. In cases in which it is authorized to reach a final determination, the Central Board shall prepare an opinion which shall include an analysis of the evidence, findings of fact and the reasoning on which the determination is based. The determination shall be reached by majority vote, shall be signed by the members, and made a permanent part of the record in the case. If a determination is not unanimous, a minority opinion shall be filed.

H. *Action by the Secretary of Defense or the Administrators*

Whenever a case falls within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), and the Central Board concludes that access at the specific classification category requested is not warranted, the Director shall forward the case to the Secretary of Defense . . . for determination. The determination shall include a review of any determinations made pursuant to paragraph IV.E.2.f. (2)(b) by any official other than the Secretary or the Administrator.

J. *Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration*

Nothing contained in this Regulation shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

STATEMENT OF THE CASE[2]

In 1956 while Petitioner was employed as a government field representative of the Underwood Corporation, in Washington, D.C., he applied for and received a "secret" security clearance pursuant to the provisions of Department of Defense Directive 5220.6, entitled "Industrial Personnel Security Review Regulation," dated February 2, 1955.[3] He

[2]Petitioner's motion for summary judgment was supported by a statement of the material facts as to which he contended there was no genuine issue. As required by Rule 9(h) of the Rules of the United States District Court, District of Columbia, Respondent failed to file a statement of genuine issues as to that statement and that statement must, therefore, be taken as true. R. 2, pp. 59-69, Appendix to Petitioner's Brief below). As to factual statements contained in that statement which have been so admitted, no record reference will be made. Record references will only be made if the fact alleged was not a part of the statement of material facts and is otherwise supported by the record.

[3]On July 28, 1960, Department of Defense Directive 5220.6 entitled "Industrial Personnel Security Review Regulation" was cancelled and a new Department of Defense Directive No. 5220.6 entitled "Industrial Personnel Access Authorization Review Regula-

continued to hold this security clearance until January 23, 1963 when it was suspended by Respondent. During this period Petitioner had left Underwood and had become a sales representative of Autonetics, Division of the North American Aviation Corporation where he was employed until January of 1962. He then became a senior Government Sales Engineer handling Air Force programs for the Philco Corporation, working out of Philco's Washington office. In December of 1962 Appellant left Philco Corporation and accepted a position with Melpar, Inc. Upon the suspension of his security clearance, and its subsequent revocation, Melpar, Inc. terminated his employment. A security clearance was a *sine qua non* of his continued employment by any defense contractor as a sales representative or engineer. He has never since been able to obtain employment with a business concern as a government sales representative or sales engineer.

The occupation of representing contractors with the Government of the United States in their contractual dealings has become a specialized one, due to the special types of knowledge the persons engaged in this occupation acquire concerning procurement policies, and contract inspection and administration practices of the Federal Government. Petitioner, in this regard, by 1963 had achieved a specialized status as a Government Sales Engineer or Sales Representative of contractors engaged in the business of manufacturing or otherwise furnishing supplies, services and equipment to the Government of the United States.

Prior to the revocation of Petitioner's security clearance and during the first six months of the year 1962, one Patricia Poole, a secretary employed in the Washington office of the Philco Corporation, served as Assistant Secur-

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tion" was issued. A copy of this Regulation and Executive Order No. 10865 upon which it was based was reproduced as Addendum No. 1 to Petitioner's Brief in the Court below. (R. 1) Also reproduced was Executive Order 10909 which amended Executive Order 10865 on January 17, 1961. (R. 1)

ity Officer, or as Acting Security Officer for that office. She was discharged by the Manager of that office in June of 1962. On or about July 17, 1962, after she had been discharged, she wrote a letter to the Security Officer of Philco Corporation, one Transue, in which it was apparently alleged, amongst other things, that Petitioner had brought a document into the Philco Washington office with a security classification on it and had cut the security classification from it and then returned it to its source, all in violation of Industrial Security Regulations which would have required that such document be logged in and returned to the Government or otherwise handled in accordance with the regulation. Apparently she also charged that in March 1962 Petitioner brought another document into the office, one not marked as classified information, but in her opinion containing classified information, and that Petitioner had asked her to copy parts of it and turn it over to the Planning Director of Philco Corporation, one Bailey, in the Philadelphia offices of the Company.[4] Following receipt of her letter, Philco Security Officer Transue came to Washington in August of 1962 to make an investigation concerning the allegations made. He made a written report of his investigation. A memorandum with reference to this report was written by an Assistant Philco Counsel, one Berry, to the General Counsel of the Company, one Nolte, on August 16, 1962. Subsequently, meetings were held in the offices of the President of the Philco Corporation at which time it was decided to "discuss the allegations" with the Manger of the Washington office and Petitioner, separately. Such discussions were held at meetings in Philadelphia on August 21 and 22, 1962. Following those discussions it was decided, tentatively, to continue the employment of Petitioner unless there was "further evidence to justify review of this decision." A report of these meetings was written by Berry although he did not attend all of the meetings. No copy of this report was ever given to Respondent nor was

[4]Although she was then Acting Security Officer, she took no action with reference to the documents at that time.

he asked to concur in the statements of fact therein set forth and attributed to him. Subsequently, Berry discussed the allegations with Robert L. Applegate, of the office of Respondent. On October 23, 1962, he forwarded to Mr. Applegate an incomplete copy of the report dated August 29, 1962 (concerning what Berry called the August 22 and 23, 1962 meetings) which he called an "extracted copy" "with asterisks indicating the deletion of non-applicable material" (R. 2, Appendix to Petitioner's Brief below, pp. 34-46).

In the meantime, the March 1962 document had been found in the possession of the Planning Director of the Philco Corporation. It was unmarked as to any classification. Transue immediately classified it as "secret" and turned it over to the Government. Subsequently the matter was referred to the F.B.I. which made an investigation. Petitioner alleged and testified that *both* the January document and the March document were obtained from a former North American Aviation fellow employee, one McGinty. McGinty did not deny giving Petitioner the March document. He denied giving the January document to Petitioner, and since Petitioner alleged that he had returned the January document to McGinty, the January document never was identified at the hearing as other than one containing unclassified "budgetary" information. The exact nature of the March 1962 document is not a matter of record, as the Federal Bureau of Investigation and the Respondent refused to produce the document at the hearing. When Petitioner was first questioned by representatives of the Federal Bureau of Investigation he refused to state the source of the two documents, asserting in writing, that if he were satisfied that the Security of the United States was involved, he would furnish the name of the source of the documents.

On January 23, 1963 Petitioner was notified by the Navy Department that pursuant to DOD Directive 5220.6, *supra*, his secret security clearance to Army, Navy and Air

Force Information was suspended, effective immediately. Petitioner demanded that action be taken by Respondent with reference to such suspension and that such suspension be lifted, or that immediate proceedings be instituted under the Regulation looking towards the lifting of the suspension. On or about the seventh day of March 1963 Petitioner, having obtained no answer to his demand for immediate proceedings, instituted suit in the United States District Court in the District of Columbia for an injunction. That action was voluntarily dismissed when the Respondent agreed to issue the statements of reasons required by the Regulations and to grant a prompt hearing. Subsequently, on March 21, 1963, the statement of reasons called for by DOD Directive 5220.6, *supra*, was issued together with Respondent's formal notice of suspension, effective immediately. The statement of reasons was based generally on the Poole allegations concerning the January and March 1962 documents, the original refusal to furnish the name of the source of the documents to the F.B.I. and the subsequent furnishing of that name after the issuance of the suspension order.

Petitioner, although believing, and consistently thereafter stating,[5] that the proceedings did not provide due process, nevertheless complied in all respects with Department of Defense Directive 5220.6. Hearings were sought and were held before the hearing officer, The Washington Industrial Personnel Access Authorization Field Board, which proceedings were detailed in a transcript thereof. Petitioner sought and was permitted thereafter to orally argue his case before the Central Industrial Personnel Access Authorization Board, after the report of the hearing officer had been forwarded to that Board and it had proposed to act adversely with reference to Petitioner's security clearance. Petitioner was

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[5]Record 1, Addendum 2 to Appellant's Brief below, a part of the hearing officer's report to the Central Board not received by Petitioner's attorney until the commencement of the action herein. R. 2, Appendix to Petitioner's Brief below, p. 51.

not at that time, nor at the time of the hearing before the Board, permitted to see, examine, or obtain any information with reference to the report. See § IV.F.1. of DOD Directive 5220.6, *supra*. The Central Board, based on that report, however, and after the oral argument, determined that the "granting of authorization to Applicant James Jude Toglia, for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest" (Appendix C, *infra*, p. 4). The fiction that Petitioner was an "applicant" rather than a holder of a security clearance that Respondent wished to revoke was continued to the very end. In making this determination the Board said (at page 4, Appendix C, *supra*):

> "It follows, too, that in accepting the testimony of Poole, Transue, et al., as presenting the true facts in this case, we conclude that Taglia and Becker have been deliberately lying throughout the proceeding."

Apparently the Board paid no attention to the testimony of the polygraph expert that Taglia was telling the truth.

It was not until after this action had been started and had been pending for some time that Respondent chose to supply Petitioner's Counsel with a certified copy of the report of the hearing officer to the Central Industrial Personnel Access Authorization Review Board. At the time of the hearing on the motion for summary judgment in the District Court, a copy of this report was filed with the District Court Judge hearing the motions.[6]

During the hearing before the hearing officer, which resulted in the recommendation to the Central Board to revoke Petitioner's security clearance, the following witnesses called by Respondent refused to produce documents or to answer questions on cross-examination:

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[6] It is of interest to note that the present DOD Industrial Personnel Access Authorization Review Regulation, 32 CFR, Part 155, § VII.E.2. provides for the furnishing of a copy of the Examiner's Report to the "applicant" in a revocation proceeding.

1. Patricia Poole refused to produce a copy of her July 1962 letter to Transue, Security Officer for the Philco Corporation, which resulted in the proceedings against Petitioner looking to the revocation of his security clearance or to answer any questions with reference to the letter. The Hearing Officer was powerless to compel the production or the answering of questions (R. 2, Appendix to Petitioner's Brief below, pp. 46-51).

2. Philco Security Officer Transue refused to produce the Poole letter or his report of his investigation of it on the ground that he did not have them (R. 2, Appendix to Petitioner's Brief below, pp. 26-34).

3. Former Philco Assistant Counsel Berry refused on the ground that the information concerning the Poole letter and the "extracted" copy of the report of the meeting were "privileged," to answer questions concerning them. The Hearing Officer sustained this claim erroneously (R. 1, Addendum 2 to Petitioner's Brief below).

4. Philco witnesses Beck, Jones and Canfield all refused to produce the Poole letter, the Transue report of his investigation of it and the complete memorandum of August 22, 1962, an "extracted" copy of which was furnished to Respondent prior to the commencement of the revocation proceedings and received in evidence (R. 1, Addendum 2, to Petitioner's Brief below).

5. Respondent's witness Byrnes, the F.B.I. agent, was called to testify but refused to produce the March document (Document B) or to answer any questions with reference to it, excepting to state that he had compared it with a "secret" document. Respondent refused to produce the March document (R. 1, Addendum 2 to Petitioners Brief below, pp. 1, 2; R. 2, Appendix to Petitioner's Brief below, pp. 19-26).[7]

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[7]No effort was made by Respondent to make the finding and determination authorized by §9 of the Executive Order in order to excuse the failure to submit to cross examination or to produce the document.

Counsel for Petitioner repeatedly objected to the lack of due process aspects of the hearing (R. 1, Addendum 2 to Petitioner's Brief below). At one point during the hearing Petitioner's Counsel moved that the case be referred back to the Department of Defense because there could not be accorded the full protection granted by Section 3 of Executive Order 10865, *supra*, with reference to full opportunity to cross examine persons making statements adverse to Petitioner.[8] Counsel for Petitioner also objected to the inability of the hearing officer to compel the attendance of witnesses, the production of documentary evidence and the power to administer oaths to witnesses (R. 1, Addendum 2 to Petitioner's Brief below, Statement of Procedural Matters, a part of the Hearing Officer's report to the Central Board which was not furnished to Petitioner until after the commencement of this action).

The same objections, that is, to the inability of the hearing officer to issue subpoenas, administer oaths and to compel the testimony of witnesses and production of documents, were made in Petitioner's argument before the Central Board after that Board had received the report of the hearing officer for consideration by it *en camera* (R. 2, Appendix to Petitioner's Brief below, pp. 72-76).[9]

In all instances Petitioner's objections were overruled or ignored and the Board proceeded to make its decision on the basis of the testimony of Poole, Transue, Berry, Jones

[8]Although this motion was made in the companion Becker case, under the stipulation in the Becker case (R. 2, Appendix to Petitioner's Brief below, pp. 16, 17) it was applicable to both cases.

[9]Note particularly the statement of Counsel on p. 73 that Poole's testimony "should have been stricken from the record when she refused to answer questions on cross examination. I cite to you Wigmore on Evidence, § 1361, Volume V. This seems to be the standard law. Regardless of how informal this proceeding is, I do believe the Examiner, in the first instance, the Field Board later on, must conform to certain criteria set out in our legal system in order to make findings and they must accord the proper weight to testimony that was given to them before this Board."

and Canfield, all Philco Corporation employees or former Philco employees, and on that of Byrnes, the F.B.I. agent, despite the fact that all of them refused to answer questions or to produce documents directly related to their testimony. See memorandum of the Central Board (R. 2, Appendix to Petitioner's Brief below, p. 78), and the detailed report of Petitioner's objections to the administrative procedures as set forth in the report of the hearing officer, *supra*.

Following revocation of his security clearance Petitioner commenced this action in the United States District Court for a judgment declaring that the acts of the Respondent in revoking his security clearance were null and void and of no effect and requiring restoration of his secret security clearance (R. 2, Appendix to Petitioner's Brief below, pp. 2-7). The jurisdiction of that court was invoked under the provisions of Title 28, §§ 1346(a)2, 1361, 2201 and 2202 and the Constitution. Respondent's answer admitted jurisdiction but otherwise denied lack of due process (R. 2, Appendix to Petitioner's Brief below, pp. 7-11).

As there was no genuine issue of fact with regard to the occurrences of which Petitioner complained, he moved for summary judgment. Respondent filed a cross motion for summary judgment. Respondent's motion was based upon its contention that the proceedings before the hearing officer and the Board accorded a fair hearing and that the evidence of record was sufficient to support the administrative action. Petitioner objected to a motion for summary judgment on the basis that the evidence of record was sufficient to support the administrative action, as neither the complaint nor the answer at that stage of the proceedings raised such an issue. Petitioner sought only a declaratory judgment on the grounds of lack of due process, and lack of authority in the Respondent to revoke his security clearance in a case where the Petitioner had not been accorded the opportunity for cross examination required by § 3 of Executive Order No. 10865, *supra*, under which

Respondent purported to act.[10] The Court overruled this objection. The Court then denied Petitioner's motion for summary judgment and granted that of Respondent. The Court ignored Petitioner's contention that the executive order under which Respondent purported to act did not confer upon him the authority to revoke Petitioner's security clearance in the absence of an effective provision in the regulations for the required opportunity to cross examine witnesses against him. The Court granted Respondent's cross motion for summary judgment on the ground that the findings of the Board upon which Respondent acted were supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross examination is excluded (Appendix B).

On appeal of this order to the United States Court of Appeals for the District of Columbia Circuit, that Court affirmed Per Curiam (Appendix A).

ARGUMENT

The decision of the United States Court of Appeals for the District of Columbia Circuit, review of which is sought here, permits the judgment of the United States Court for the District of Columbia below to stand on the ground that the Court of Appeals was "in general agreement with the reasons stated for its judgment by the District Court." Those reasons were as follows (Appendix B):

1. The administrative procedures; that is, those provided by the Respondent's Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6 of July 28, 1960, provided a full and fair hearing with ample opportunity to cross examine witnesses as required by *Greene v. McElroy*, 360 U.S. 474 (1957);

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[10] Respondent had not made the finding required by § 9 of the Executive Order which was the only basis on which he could have proceeded without according full opportunity for cross examination.

2. Although the hearing officer may have been unable to compel testimony on cross examination, Plaintiffs could have protected their rights by a motion to strike but elected not to do so; and

3. The findings are supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross examination is excluded.

This decision, it is suggested, is in conflict with the decision of this Court in *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L. Ed. 2d 1377 and raises the serious question of whether or not the Executive Order of the President following *Greene v. McElroy* and the Regulation of the Secretary of Defense following that Executive Order are in conflict with the due process standards set by this Court in that case.

In *Greene v. McElroy, supra*, this court pointed to its zealous protection of the rights of individuals to full and fair hearings including the rights of confrontation and cross examination." It said (at pp. 506, 507, 360 U.S.):

> ". . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Cf. *Watkins v. United States*, 354 U.S. 178; *Scull v. Virginia*, 359 U.S. 344. . . ."

And at pp. 507, 508, 360 U.S. this Court said:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86,

101; *Dismuke v United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Company v. The Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 354 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's law makers, even in areas where it is possible that the Constitution presents no inhibition.

This Court then concluded that (p. 508, 360 U.S.):

> "... The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether Congressional action is necessary, or what the limits on Executive or Legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."

Obviously Executive Order No. 10865 of the President followed *Greene v. McElroy* and was clearly; by its terms, designed to permit the Respondent to make certain administrative determinations in accordance with the "explicit authorization" of the President. But it is equally clear that the President was not disposed, excepting under the conditions set forth in §§ 4 and 9 of the Executive Order, to explicitly authorize revocation of a security clearance without according to the holder thereof a full and fair hearing with "an opportunity to cross examine persons either orally or through written interrogatories" (§ 3, Executive Order No. 10865). Here Respondent was faced with

lack of the statutory authority to compel the attendance and testimony of witnesses, and the production of documents, not with the exceptions specified by §§ 4 and 9 of the Executive Order. Witnesses had to be "invited" to appear and attend. See § 6 of Executive Order No. 10865, as amended by Executive Order No. 10909, *supra*. See also § I.D.3 of Respondent's Industrial Personnel Access Authorization Review Regulation of July 28, 1960 (R. 1, Addendum to Petitioner's Brief below, p. 2). The concept of "inviting" witnesses to attend an administrative hearing at which a holder of an industrial security clearance (access authorization) can be deprived of his job is ludicrous. One cannot imagine that the Congress would have withheld the granting of subpoena power with its concomitant authority to compel attendance, production of documents and answers to questions in industrial security cases, had Respondent requested it.

Furthermore, it is apparent from an examination of Respondent's Regulation, *supra*, that the limitation of § 3 of the Executive Order was virtually ignored. The proceedings are labeled as non-adversary (§ IV.E.1.b.). Cross examination, excepting in those cases described in § 4 (not here involved) of the Executive Order is stated to be available in the administrative hearing. Nothing is said about procedure when cross examination is not available solely because the witness refuses to answer. Section IV.F.1.3. states that the hearing officer (Field Board) shall give "appropriate consideration to the fact that" there was "no opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information." Nothing is said about the determination authorized in Section 9 of the Executive Order. However, the Secretary, despite the decision of this Court in *Greene v. McElroy*, *supra*, thought he still had broad general powers, as the Regulation, § IV.J., says:

J. *Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration*

> Nothing contained in this Regulation shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

But here there was no such determination, if Respondent had such powers, just as there was no determination under § 9 of the Executive Order.

The decision of the Court below with reference to failure on the part of Petitioner to move to strike the testimony of the recalcitrant witnesses, it is suggested, is contrary to existing law and to the evidence. Petitioner never "elected" not to strike. Petitioner in effect moved to strike (R. 2, Appendix to Petitioner's Brief below, p. 73). Furthermore, it is not a matter of a technical motion to strike, it is a matter of "waiver." *Wigmore on Evidence*, Vol. V. § 1390, p. 111. Here Petitioner's numerous objections to the lack of due process and the inability of the hearing officer to compel the production of documents and answers to questions on cross examination negate any thought of waiver.

That part of the District Court's decision that the findings are supported by ample evidence, even if the testimony of the witnesses who were not compelled to answer on cross examination is not considered, is not relevant. In a case in which the administrative process requires a full hearing, including the opportunity for cross examination,[11]

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[11] Mere presence of the witnesses at the hearing was not "an opportunity for cross-examination where they refused to answer

failure to accord such a hearing is fatal to the administrative decision. As in *Greene v. McElroy*, the Respondent here has not been empowered, by legislative enactment or by the Executive Order "to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of . . . cross-examination."

The comparison of the Executive Orders, the Regulations, and this Court's decision in *Greene v. McElroy*, suggests that the Regulation of Respondent is fatally defective in that it does not accord to holders of security clearances, in cases such as that here involved, the long-accepted notions of fair procedures.

CONCLUSION

It is therefore, submitted that this Court should grant certiorari to consider and decide the extent to which the Regulations of Respondent meet the standards of fair procedures, and particularly those having reference to the opportunity for cross examination, which have been so zealously guarded by this Court in the past.

Respectfully submitted,

ROBERT SHERIFFS MOSS
1815 H Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

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questions or produce documents. Wigmore on Evidence, Vol. V,

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23,076 September Term, 1969

[Filed: Apr. 27, 1970]

JAMES J. TAGLIA,
Appellant,

v. : Civil Action No. 642-66

MELVIN R. LAIRD,
Secretary of Defense,
Appellee.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and McGOWAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration thereof, and this court being in general agreement with the reasons stated for its judgment by the District Court; it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

[Filed: Mar. 19, 1969]

JAMES J. TAGLIA,
Plaintiff,

v. : Civil Action No. 642-66

CLARK M. CLIFFORD,
Secretary of Defense,
Defendant.

LEO GEORGE BECKER,
Plaintiff,

v. : Civil Action No. 643-66

CLARK M. CLIFFORD,
Secretary of Defense,
Defendant.

ORDER

By Order of this Court dated February 18, 1969, the Order of this Court dated February 5, 1969, was vacated to permit counsel to file certain additional materials; and those materials including Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Statement of Genuine Issues in Opposition to Defendant's Motion for Summary Judgment, Response to Plaintiff's Statement of Genuine Issues in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's

Supplement to Opposition to Defendant's Motion for Summary Judgment in Response to Defendant's Reply Thereto, and Response to Defendant's Reply to Plaintiffs' Supplement to Opposition to Defendant's Cross-Motion for Summary Judgment, and Plaintiffs' Supplement to Their Memorandum of Points and Authorities in Support of Their Motions for Summary Judgment having been filed and fully considered by the Court; and it appearing to the Court that upon consideration of these further materials that its original decision was correct and that the administrative procedures provided a full and fair hearing with ample opportunity to cross-examine witnesses as required by *Greene v. McElroy*, 360 U.S. 474 (1957), and that although the hearing officer may have been unable to compel testimony on cross-examination as to certain questions, plaintiffs could have protected their rights by a motion to strike but elected not to do so; and, that the findings are supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross-examination is excluded, it is by the Court this 17th day of March, 1969,

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied and that defendant's motion for summary judgment be and the same hereby is granted.

/s/ Oliver Gasch
Judge

APPENDIX C

CENTRAL INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION BOARD

MEMORANDUM FOR THE DIRECTOR, OIPAAR

SUBJECT: Final Determination in the Case of –
TAGLIA, James Jude – OSD 63-131

14 Dec. 1964

DOB: May 24, 1924
POB: Chicago, Illinois
Extent Access Authorization:
NONE (Secret until January 23, 1963, when authorization for access at any level was suspended by Department of the Navy.)

Access Authorization Requested: Secret
Determination: Deny access authorization at any level.

On October 6, 1964, the Central Board, after consideration of Applicant's answer to the Statement of Reasons, the record of the proceeding before the Washington Industrial Personnel Access Authorization Field Board, at which Applicant appeared with counsel, briefs filed by respective counsel for Applicant and the Department of Defense, and the Field Board Report, determined tentatively that the granting of authorization to him for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest. At the same time the Board announced that it proposed to find against Applicant with respect to each allegation, paragraph, and Criterion of the Statement of Reasons, except the following:

a. That portion of subparagraph 1.a.(3) alleging disclosure of the referenced document to Messrs. John O'Neill and Robert Burns;

b. All of subparagraph 2.g.(4); and

c. That portion of paragraph 3. alleging criminal conduct.

With respect to the excepted portions specified above, the Board proposed to find in Applicant's favor.

In accordance with the provisions of Paragraph IV.G.3.a of the Regulation, Applicant and his counsel were notified of the Board's tentative determination and proposed findings, and Applicant was offered an opportunity to appear personally before the Board, with or without counsel, or through counsel, to present further argument in his behalf. He was advised further that, in lieu of such appearance, he could file a brief for the Board's consideration.

Applicant elected to appear personally before the Central Board for the purpose of presenting further argument. The date of December 2, 1964, was set for the appearance, and Applicant presented himself upon the appointed date accompanied by counsel, Rodolphe J. A. de Seife, Esquire, of the firm of Hart, Moss and Tavenner, Washington, D.C. The Department was represented at the proceeding by John Davis, Esquire, Chief Department Counsel.

Neither Applicant nor his counsel, each of whom addressed the Central Board, presented anything new in the way of argument that had not already been presented at the Field Board level, either during the course of the Field Board proceeding or in Applicant's post-proceeding brief. Applicant's own presentation to the Central Board partook more of the nature of testimony rather than of argument, and he generally reiterated his version of events as related at the Field Board proceeding.

Applicant's counsel, after a brief personal attack upon Chief Department Counsel, concentrated his fire upon the credibility of the Department's witnesses, most particularly the witness Poole. Also, he called attention again to his inability to obtain production at the proceeding of the

so-called "Poole letter," and to the declinations of two of the Department's witnesses, viz., Poole and Berry, to answer certain questions put to them. It will be noted that those matters have been discussed at some length in the Field Board Report which, as specified hereinafter, we have approved and adopted.

Chief Department Counsel's presentation to the Central Board was brief and was devoted almost exclusively to an emphasis upon the credibility of the witness Berry. Counsel called attention particularly to the background, professional stature, and apparent personal disinterest of Berry in the outcome of this case.

Having given careful consideration to the arguments presented at the appearance before this Board and discerning no basis therein for altering our original evaluation of this case, we herewith adopt our aforementioned tentative determination and proposed findings as our final determination and findings herein.

This case is a companion to that of Leo George Becker, OSD 63-174, heard by the Washington Field Board intermittently over the period from June 25, 1963, to April 16, 1964. Through stipulation and assertions at the proceedings, Department Counsel and Counsel for the Applicants agreed that the entire record of the Field Board proceeding in the Becker case—comprised of some 3000 pages of transcript, plus voluminous exhibits—should be considered by the Field Board, and later by the Central Board, in making their respective findings, recommendation, and determination in instant case. It was further agreed that complete reliance would be placed upon the respective Boards to distinguish the evidence in the Becker case that was not applicable to Taglia (Stipulation, Becker Transcript, pp. 41-49; Taglia Transcript, pp. 57-62).

The Statement of Reasons in this case, cast under Criteria 13, 14, 16 and 17, is predicated primarily upon the following allegations:

a. That in January, 1962, Applicant, without being authorized to do so, knowingly and deliberately procured or acquired a classified defense document consisting of approximately 15 pages, and thereafter mishandled it in divers ways as specified in the State ..ent of Reasons, all in deliberate and willful violation or disregard of official regulations as provided in the Industrial Security Manual for Safeguarding Classified Information; and that he ultimately destroyed or otherwise disposed of that document without recording such action as required by the Industrial Security Manual.

b. That in about March, 1962, without being authorized to do so, he procured or otherwise acquired a document consisting of approximately 43 pages containing defense information classified at the level of Secret, which information Applicant knew at the time was classified Defense Department information, and thereafter mishandled the document in divers ways as specified in the Statement of Reasons, all in deliberate and willful violation or disregard of official regulations as provided in the aforesaid Industrial Security Manual.

c. That on November 5, 1962, when interviewed by representatives of the Federal Bureau of Investigation who requested his cooperation in an official investigation involving the aforesaid documents, Applicant knowingly, willfully, and deliberately refused to disclose the source or sources from whom he had obtained the documents, and he persisted in such refusal until January 24, 1963, which was immediately after he received notice of the emergency suspension of his access authorization.

d. That on November 14, 1962, and again on January 24, 1963 (to representatives of the Federal Bureau of Investigation), in a signed, sworn statement dated January 31, 1963, furnished to the Department of Defense; and on February 13, 1963, during the course of an interview with representatives of the Office of Industrial Personnel Access Authorization Review, Applicant knowingly and willfully,

with deliberate intent to deceive, made divers false official statements—specified in detail in the Statement of Reasons—with reference to the aforesaid documents and his handling of them.

As previously indicated, the record in this case—including, as it does, the Becker record—is voluminous, consisting of several thousands of pages of testimony and numerous exhibits. That evidence is summarized in great detail and with a very high degree of accuracy in a categorized and paginated recapitulation prepared by the Examiner and included as an attachment to his excellent Report. We herewith adopt that summary as our own and incorporate it herein by this reference.

We likewise ratify and adopt, without modification, the Examiner's lucid discussion of the evidence and his findings of fact. In so doing we are not unmindful of the irreconcilable conflicts in the evidence before us—particularly as between the testimony of the witnesses Poole, Transue, Berry, Jones, Beck, Byrnes, and Gaffney on the one hand and the testimony of Taglia and Becker on the other. In concluding that the testimony of the former group represents the truth rather than does the testimony of Taglia and Becker, our judgment has been influenced by many factors. Not the least of those factors is the Examiner's assessment of the credibility of Poole, Transue, et al., as contrasted with his assessment of Taglia and Becker (Report, p. 19). Other considerations entering therein are the stature of such witnesses as Berry, Jones, Beck, Byrnes, and Gaffney; their apparent personal disinterest in the outcome of this case; the extent to which their testimony tended to corroborate the testimony of Poole and Transue, as well as each other; and the absence of significant inconsistencies between their statements.

It follows, too, that in accepting the testimony of Poole, Transue, et al., as presenting the true facts in this case, we conclude that Taglia and Becker have been deliberately lying throughout the proceeding.

Before concluding this memorandum we think it well to touch briefly upon the procedural aspects of this case. As pointed out by the Examiner in his Report, Counsel for Taglia (and Becker) maintained throughout the proceeding that the Applicants could not be accorded due process in a proceeding conducted pursuant to the controlling Regulation. Through various motions and by other means, Counsel for Applicants continually raised procedural and administrative questions and elicited rulings in those areas. In the light of those efforts by Counsel for Applicants, the Examiner deemed it appropriate to submit as an attachment to his Report a list of the principal procedural questions raised by Applicants during the proceeding and the dispositions thereof. We have reviewed those matters carefully and we share the Examiner's belief that no prejudicial procedural error is reflected therein; nor do we discern any such error anywhere else in the extensive record before us.

DETERMINATION

Upon the basis of all the available information, the Central Board determines that the granting of authorization to Applicant James Jude Taglia for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest.

/s/ Gerald C. Cowden
USA, Member

/s/. William J. Scanlon
USN, Member

/s/ Charles E. Wainwright
USAF, Chairman

ADDENDUM

I am in complete accord with the determination and findings. The only purpose of this addition is to reflect a brief discussion of two or three points incidentally injected into the record but not bearing on the case to the extent of affecting in the slightest the outcome announced by this Board.

First, the record, more voluminous than any ever transmitted to this Board, was replete with objections, discussions, interruptions and arguments by counsel. This, plus bickering and clashing, unduly prolonged the record, and would have tested the patience of Judge Medina. For example, referring to the examination of one witness only of the many examined (Poole), see transcript pages 782, 796, 798, 799, 828, 830, 834, 836, 847, 855, 871, 874, 879, 885, 888, 890, 901, 903, 905, 910, 911, 917, 921, 925, 927, 929, 930, 936, 938, 949, 953, 973, 976, 983, 986, 994, 1005, 1007, 1012, 1016, 1019, 1028, 1032, 1042, 1055, 1078, 1081, 1084, 1089, 1094, 1096, 1099. The examiner showed great patience and forbearance and we think, as stated in the Memorandum, no prejudicial procedural error is reflected in the record; on the contrary, if there was leniency or elasticity, it tended to favor Applicant.

Having in mind that this was not an adversary proceeding or court trial, I think the appearance proceeding might have been accomplished without *all* the numerous and sundry objections, rulings and exceptions (outmoded) that would be more appropriate and effective in a trial of a murder case in a *nisi prius* court; however, we think the Examiner did all he could to suppress the ardor of counsel, and certainly he did all in his power to control the course of the proceeding by excluding irrelevant material, needless repetition and cumulative testimony, within the intent and spirit of the Director's Memorandum dated 6 March 1964 on the subject. Sometimes leading questions accomplish a better result than the strict approach demanded by application of the rules of evidence governing the examination of

witnesses. In this the Board favors leniency and relaxation of strict rules where no impropriety results, in favor of accomplishing a speedy presentation and a shorter and less expensive transcript.

Second, incidental mention appears in the record of certain civil cases pending in the courts wherein Applicants were seeking damages for publication of a libel, and it was apparent that counsel for Applicants were attempting to tailor the record in this proceeding so as to use it to test credibility of witnesses who might appear in those cases. Although having no bearing on or connection with this proceeding, it is of interest to note that in the suits of *Becker v. Philco Corporation* and *Taglia v. Philco Corporation*, Civil Actions Nos. 3081 and 3082 in the U.S. District Court for the E. District of Virginia, on 4 September 1964 the court entered a memorandum directing summary judgment for the defendant in each case, on the ground of absolute privilege in the performance of a governmental function. United States Law Week of 9/22/1964, 33 LW 2137.

We also understand that similar libel actions against *Poole*, Nos. 9247 and 9250 At Law in the Circuit Court for Arlington County, were dismissed in October 1963.

Third, counsel for Applicants has suggested, but not urged, that the "Department of Defense . . . . has already precluded the repetition of such an injustice in the future, by its newly adopted regulations" and "asks whether it is not punishment enough for whatever alleged lack of good judgment he may have been guilt of" to have been deprived of his normal livelihood for over one year. Reference is made, of course, to Paragraph IV.J. of the Directive, effective 16 November 1963, providing for a one year suspension to protect classified information in cases of a serious and willful violation of security regulations. Such, however, is not the theory of these cases, and this Board is not required or called upon to apply the provision or tailor the determination and findings to fit it; and in any event, such application would clash with the unfavorable

finding on Criterion 14. The cases of *McNaughton*, OSD 62-355 and *Larson*, OSD 62-365, although similar in some respects; are not considered precedents for application of Paragraph IV.J. here.

Last, I consider that the Examiner has submitted a Report which is outstanding and deserves the highest commendation. It reflects meticulous care, great effort and the highest competence and ability. Its accuracy as a whole is such that I share with the other members the conclusion that it can be adopted without hesitance or reservation.

/s/ Charles E. Wainwright
USAF, Chairman

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 449

JAMES JUDE TAGLIA, PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not yet reported. The order of the district court (Pet. App. B 1–2) is not reported. The memorandum opinion and determination of the Central Industrial Personnel Access Authorization Board, Department of Defense (Pet. App. C), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1970. The petition for a writ of certiorari was filed on July 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the right of confrontation or otherwise denied a fair hearing in the administrative proceedings which resulted in revocation of his security clearance.

STATEMENT

Petitioner's security clearance, which he had held as a civilian employee of the Philco Corporation, a defense contractor, was suspended in 1963 and, following extensive administrative hearings, was ultimately revoked under the Industrial Personnel Security Clearance Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 (Pet. 3–7), and Department of Defense Directive 5220.6, 25 Fed. Reg. 14392, as amended, 31 Fed. Reg. 16188 (Pet. 7–14).[1]

In essence, the charges which led to the revocation were that, in January 1962 and again in March 1962, petitioner mishandled classified documents at his place

[1] The Executive Order and these administrative regulations were promulgated after this Court held in *Greene* v. *McElroy*, 360 U.S. 474, that the then-existing security clearance procedures, which had not been authorized by the President or Congress, were defective in failing to provide the safeguards of confrontation and cross-examination.

The present security clearance procedures, which provide for the rights to confrontation and cross-examination at the hearing, are outlined in our Brief in Opposition in *Shoultz* v. *Laird*, No. 544, O.T. 1969, pp. 2–4 (certiorari denied, 396 U.S. 962). We are providing petitioner's counsel with a copy of that Brief in Opposition. These procedures were also upheld, in a somewhat different context, in *Adams* v. *Laird*, 420 F.2d 230 (C.A. D.C.), certiorari denied, 397 U.S. 1039.

of employment and made false statements concerning his handling of them (see Pet. App. C 4–5). Extensive evidence was adduced by both sides. The evidence showed, and the Board found, that petitioner had cut portions from the January classified document which indicated its classified nature and had never returned the document to its proper source (see Tr. 804–809, 821, 952),[2] and that petitioner improperly procured the March document, failed to report and record its receipt, and caused its reproduction without authority (see, *e.g.*, Tr. 809–810, 812, 816, 820, 956, 958–963, 1388, 1390, 1391).

The district court upheld the administrative decision. With reference to the issues relevant here, it ruled that "the administrative procedures provided a full and fair hearing with ample opportunity to cross-examine witnesses" in compliance with *Greene* v. *McElroy*, 360 U.S. 474; that while the "hearing officer may have been unable to compel testimony on cross-examination as to certain questions," petitioner

[2] "Tr." designates the 20-volume transcript of the administrative hearings conducted on 21 days in 1963 and 1964. These volumes contain the testimony of twenty-five witnesses and run to more than 2900 pages. They and other pertinent papers have been lodged with the Clerk of this Court.

[3] In the district court this case was consolidated with *Leo George Becker* v. *Laird*. The proceedings against Becker were based upon his participation in the same events and also resulted in revocation of his "top secret" Industrial Security Clearance. He also brought suit against the Secretary of Defense; the district court denied his motion for summary judgment and rendered judgment in favor of the Secretary of Defense. An appeal was taken by Becker, but was not pursued and the court dismissed his appeal on November 17, 1969.

failed to make any motion to strike the testimony of such witness; and that, in any event, "the findings are supported by ample evidence," excluding consideration of the testimony of any witness who refused to answer questions on cross-examination (Pet. App. B 1–2). The court of appeals affirmed *per curiam*, noting its "general agreement" with the reasoning of the district court (Pet. App. A 1).

ARGUMENT

The courts below properly upheld the administrative determination, and there is no reason for further review.

The only items which certain witnesses failed to produce or testify about were: a letter Miss Poole, a security employee at Philco, had written in July 1962 to Mr. Trainsue, Philco's Security Director relating to alleged security violations (Tr. 244–245, 309); Mr. Trainsue's report of his investigation prompted by his dealings with Miss Poole (Tr. 310–311); portions of the "Berry Memorandum"[1] and the March 1962 classified document. Petitioner, however, did not attempt to build his case on these documents, nor was his presentation hindered by the refusal of the witnesses to discuss what essentially were peripheral

[1] Mr. Berry, who testified at the administrative hearing, was an attorney for Philco. The "Memorandum" refers to his report to his superiors at Philco of a conference at the Philco office in Philadelphia on August 22, 1962, at which alleged security violations were discussed (see Tr. 475–476; Gov. Ex. A–2).

matters.[7] Petitioner thoroughly cross-examined these witnesses at length on the central issue of whether, in fact, he had handled the documents in violation of applicable regulations.[8]

Indeed, petitioner's failure to move to strike the testimony of these witnesses strongly suggests that he did not deem their silence on these points crucial to his case. See, *e.g.*, *Adams* v. *Laird*, 420 F. 2d 230, 238 (C.A. D.C.), certiorari denied, 397 U.S. 1029; *Stephan* v. *United States*, 133 F. 2d 87, 97 (C.A. 6), certiorari denied, 318 U.S. 781; 5 Wigmore, *Evidence* (3rd ed. 1940) § 1391. Although petitioner contends that he "in effect moved to strike" this testimony (Pet. 27), his reference is not to anything that occurred at the hearing at which the evidence was adduced but is to his oral argument to the appeal board. There was, in short, confrontation and full cross examination of all witnesses on the salient issues, in compliance with the requirements of *Greene* v. *McElroy*, 360 U.S. 474.

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[7] It seems a fair assumption that the witnesses refused to discuss the Poole, Transue and Berry documents which all related to the internal operations of Philco [sic] in pending libel suits brought by petitioner against Miss Poole and Philco on the day before the administrative hearing commenced. The suit against Miss Poole was dismissed and no appeal was taken. Judgment in the other suit was for Philco. See *Tomlin* v. *Philco Corp.*, 372 F. 2d 774 (C.A. 4), certiorari denied *sub nom. Becker* v. *Philco Corp.*, 389 U.S. 979.

As to the March 1962 classified document, petitioner's rights were fully protected by his opportunity to cross-examine F.B.I. agent Byrnes, who compared that document with the original "secret" document in the Pentagon (Tr. 184).

[8] For example, cross-examination of Mr. Transue consisted of 134 pages, of Mr. Berry 122 pages and of Miss Poole 255 pages.

We point out finally that the government—as both courts below held—amply established its case wholly apart from the attenuated matters of which petitioner now complains (see the brief for appellee in the court of appeals, particularly pp. 3–12, 20–21, which we are filing herewith).[*]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

ROBERT L. KEUCH,
LEE B. ANDERSON,
Attorneys.

AUGUST 1970.

[*] Although petitioner complains that he was denied the power to compel the attendance of witnesses by subpoena, he has made no showing that he did not have the benefit of all witnesses he wished to have participate at the hearing. No subpoena power exists in these proceedings.

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IN THE

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OCTOBER TERM, 1970

NO. 449

JAMES JUDE TAGLIA,
PETITIONER,

V.

MELVIN R. LAIRD,
SECRETARY OF DEFENSE
RESPONDENT.

PETITION FOR REHEARING OF ORDER
DENYING PETITION FOR WRIT OF CERTIORARI

ROBERT SHERIFFS MOSS

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20006

ATTORNEY FOR PETITIONER

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner, James Jude Taglia, respectfully prays that the Court reconsider its order denying his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, in the above entitle cause, entered by this Court on October 12, 1970, and grant the Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration

of the following:

1. The Petition for a Writ of Certiorari was centered primarily on an alleged violation of the ruling of this Court in the case of Greene v. McElroy, 360 U.S. 474 (1957), and essentially invited this Court's attention to the fact that the administrative proceeding conducted by the Department of Defense, wherein Petitioner's security clearance was revoked, thereby depriving him of employment at his chosen occupation, was conducted under regulations which failed to assure to Petitioner the requisite fundamental elements of due process of law. The factual basis for Petitioner's allegation in the Petition of error in the administrative proceedings consists of the denial of a full opportunity to cross-examine witnesses due to the refusal of the witnesses to answer questions propounded by the attorney for Petitioner on cross-examination. The decision of the United States District Court for the District of Columbia which upheld the administrative decision to revoke the security clearance posed three grounds for its action. (Pet. App. B.1). The District Court decision was affirmed per curiam by the United States Court of Appeals primarily on the basis that it was in "general agreement" with the reasoning of the District Court. (Pet. App. A.1).

2. Since the Petition and record filed herein clearly establish the denial of due process, it is considered that this Court must have concluded that the Petitioner's due process rights had either

the testimony of recalcitrant witnesses, or that the decision of the District Court that, even if the testimony of the recalcitrant witnesses was not considered, the decision of the Respondent revoking Petitioner's industrial security clearance was supported by substantial evidence was correct. In either case Petitioner urges this Court, for the reasons hereinafter set forth and not fully presented in the Petition to review the decision below, to grant Certiorari in this case to consider whether or not an administrative decision may be considered as being supported by substantial evidence where the record discloses that the principal witnesses, as was the case here, refused to answer question on cross-examination and Petitioner was unable to subpoena the witnesses for the purpose of eliciting material testimony.

The administrative proceeding which was conducted by the Department of Defense under DOD Directive 5220.6, 25 F.R. 14392, as amended, 31 F.R. 16188 (Pet. 7-14), allowing introduction of testimony adverse to Petitioner without providing the assurance of cross-examination was unauthorized by Executive Order No. 10865 which established the industrial personnel security clearance program. The failure of the regulation to insure the right of cross-examination makes the Regulation and the proceeding had thereunder fatally defective under Greene v. McElroy, 360 U.S. 474 (1957), because neither Congress nor the President by Executive Order No. 10865 authorized

withholding or curtailment of this right guaranteed by the Constitution of the United States as essential to due process of law.

The conclusion of the United States District Court that "the administrative procedures provided a full and fair hearing with ample opportunity to cross-examine witnesses as required by Greene v. McElroy, 360 U.S. 474 (1957)..." is erroneous as a matter of law. The Department of Defense Regulations, supra, which governed the proceedings did not provide any method for compelling answers on cross-examination. Witnesses for the Government testified freely on direct examination but refused to answer pertinent and essential questions propounded by the Attorney for Petitioner on cross-examination. Since there was no method for compelling the witnesses to answer, the testimony presented on direct examination could not be properly tested through cross-examination, and relevant evidence was excluded from disclosure at the will of the witnesses. This Court has quite clearly held that where the presiding officer in an administrative proceeding improperly curtails cross-examination there is a denial of a fair hearing.1/ If improper curtailment of cross-examination by the presiding officer results in a denial of a fair hearing it is inconceivable that a proceeding wherein witnesses themselves can and do refuse to answer material questions on cross-examination is "a fair and full hearing with ample opportunity to cross-examine witnesses".

The alternate holding of the United States District Court that "although the hearing officer may have been unable to compel testimony on cross-examination as to certain questions, plaintiffs could have protected their rights by a motion to strike but elected not to do so" is also erroneous. One of the essential characteristics of an administrative proceeding is the absence of technical, procedural rules which in the context of the proceedings serve no useful purpose. Davis, Administrative Law Treatise, 1958, Vol. 2, §1403. Professor Davis says (at §1403):

> "To the extent that the exclusionary rules of evidence are the peculiar product of the jury system, they should be deemed inapplicable to cases tried without juries, both in the judicial process and in the administrative process. Except for the rules of privilege, the exclusionary rules are rather clearly based upon the needs, real or supposed, of protecting untrained jurors from relevant but possibly misleading evidence."

Professor Davis in support of this statement cites Wigmore, Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?, 17 Ill. L.Rev. 263 (1922) as follows:

> "Historically, the rules of evidence familiar to Anglo-American lawyers were a

> direct growth out of trial by jury... Presumably, therefore, the rules are inapt for a permanent officer or board sitting without a jury and skilled by long habit in the investigation of a special kind of controversy."

While there is a rational and substantial basis in a trial to a jury for requiring a motion to strike objectionable evidence, thus allowing the Court to give exclusionary and cautionary instruction to the jury, in administrative proceedings the rule is without any underlying rationale. The testimony and other evidence in an administrative proceeding is heard and considered by a quasi-judicial hearing examiner. Once testimony is given in such a proceeding and objection is taken, a technical motion to strike is a useless gesture.

In this connection it may be observed that there is a substantial body of case law which holds that hearsay and other "incompetent" evidence may be received in evidence and may support an agency's findings. See Davis, Administrative Law Treatise, Vol. 2, §1409. As was stated by Judge Learned Hand in G. & C. Merriam Co. v. Syndicate Publishing Co., 208 F. 515, 518 (2d Cir. 1913), where the only evidence either way on a fact in issue was hearsay: "If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that". Therefore, in an administrative proceeding it is

perhaps necessary that evidence which is objectionable on occasion be admitted in evidence and the hearing examiner be allowed to determine its probative value.

However, the testimony of a witness given on direct examination which is not subject to the test of cross-examination because the witness refuses to answer questions on cross-examination can have no probative value whatsoever. Where the hearing examiner is fully apprised of the objections thereto, a motion to strike serves no useful purpose. When the hearing examiner is apprised of the fact that the testimony is objectionable and of the nature of the objection he is in the same position as though a technical motion to strike had been made. He must then, in making his findings of fact and reaching a decision in the case, take cognizance of the objectionable nature of the testimony, and if, when related to other evidence presented, it fails to have probative value, it should be disregarded.

Additionally, where cross-examination is denied and the hearing examiner is without power to subpoena witnesses a motion to strike does not suffice to produce a fair hearing. Not only does objection lie as to the probative value of testimony presented on direct examination, but more importantly there is necessarily involved an inability to elicit evidence which is material and pertinent to the inquiry. The notion that a failure to move to strike testimony presented on direct examination cures the defect existing when cross-examination is withheld may have validity where the witness may be supponed by the

aggrieved party and required to testify. However, when the subpoena power is unavailable, the defending party has no method for obtaining the material information which the witness refuses to disclose, and a different problem is presented.

In the instant case Petitioner's attorney continuously objected to the entire proceeding for failure to assure cross-examination, thus clearly placing the hearing examiner on notice that testimony introduced on direct-examination where witnesses refused to answer questions on cross-examination was objectionable. Petitioner's attorney was unable to elicit material information which the witnesses possessed due to their refusal to answer questions on cross-examination and to the absence of the power of subpoena whereby the witness could be called by Petitioner and be required to answer.

Thus, a technical motion to strike was inappropriate in the administrative proceeding here involved; but even if it had been made it would not have cured the defect arising from Petitioner's inability to elicit material and relevant testimony from the witness who refused to answer questions on cross-examination. The District Court's reliance on Petitioner's failure to make a technical motion to strike, expecially where the reliance resulted in the acceptance of findings based on testimony not tested by the constitutionally protected right of cross-examination was clearly erroneous. It is difficult to understand how this Court could stand aside and permit so flagrant an abuse of due process.

The objections of Counsel for Petitioner were sufficient to raise and preserve Petitioner's claim of error, involving both the testimony presented on direct examination and the inability to elicit relevant information. The inability and refusal of the administrative tribunal to assure cross-examination makes the proceeding constitutionally defective and a technical motion to strike would not have remedied the defect.

The alternate holding of the District Court that "the findings are supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross-examination is excluded..." is without support in the record and is clearly erroneous. The witnesses who refused to answer questions on cross-examination were key government witnesses. If the testimony given on direct examination by these witnesses is disregarded the record fails to establish a prima facie case of violation of the industrial security regulations. In particular, the testimony of witness Poole and witness Byrnes were essential to establishment that the documents alleged to have been compromised by the Petitioner were in fact classified. In addition to this aspect of the factual basis for the administrative decision, there remains a fatal defect in that, due to the denial of cross-examination, the District Court was necessarily speculating on what the record would have established had these witnesses fully answered all questions on cross-examination. In view of the denial of Petitioner's right under Green v. McElroy, supra, to be afforded cross-examination of adverse witnesses, unless Congress or the

President provides for curtailment of this right (which neither has done) 2/, any decision by the District Court which is based on what the record in its present form establishes is arbitrary and capricious. Petitioner was in fact denied the right of cross-examination, and it is inherently impossible for the District Court, on the present record, to determine what additional facts would have been established had Petitioner's cross-examination of government witnesses not been willfully and unconstitutionally curtailed.

Petitioner respectfully asks that this court reconsider its order denying the Petition for Writ of Certiorari and grant the requested Writ of Certiorari in order that the question of whether or not a decision of an administrative agency can be considered to be supported by substantial evidence in such cases where key witnesses refuse to answer questions on cross-examination, thus denying to the court judicially reviewing the decision a complete and full record. The alternative is to permit the reviewing court to speculate as to the record.

2/ That Congress has regarded the right of cross-examination to be essential in administrative proceedings is evidenced by Congressional documents pertaining to the Administrative Procedure Act: "To the extent that

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in paragraph 2 of Rule 58.

ROBERT SHERIFFS MOSS